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ABSTRACT

The issue contains reports on seven new court cases regarding mental retardation and the law and updated information on 35 cases previously reported. Cases concern such issues as classification, commitment, education, employment, sterilization, and treatment. Also included is a feature article on the implications of Halderman v Pennhurst State School and Hospital for the future of institutions for retarded citizens. (CL)

MENTAL RETARDATION and the LAW

A Report on Status of Current Legal Cases

July [illegible]

This issue of "Mental Retardation and the Law" contains reports on 7 new cases (indicated as new in the text by an asterisk) and updated information on 35 cases reported in previous issues. Also included is a feature article, entitled THE FUTURE OF INSTITUTIONS FOR RETARDED CITIZENS: The Promise of the Pennhurst Case - by David Ferleger.

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of the Assistant Secretary for Human Development
PRESIDENT'S COMMITTEE ON MENTAL RETARDATION
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TABLE OF CONTENTS

* Cases reported for the first time in this issue are marked with an asterisk.

I. CURRENT CASES

A. CLASSIFICATION

CALIFORNIA: Larry P. v. Riles, Civil No. C-71-2270 RFP, 343 F. Supp. 13-7 (N.D. Cal. 1972), aff'd, 502 F.2d 963 (9th Cir. 1974), further briefs filed April 1978.

This case challenges the use of culturally biased IQ tests to diagnose and place black children in classes for the educable mentally retarded. In its post-trial Brief filed on or about April 19, 1978, the United States as amicus curiae asks the court to enjoin the use of standardized IQ tests which are found to be culturally biased for diagnosis of mental retardation in black children in California public schools and to enjoin the use of such test results to place black children in public school EMR classes. It is proposed that defendants must affirmatively establish that standardized IQ tests, other than ones found by the court to be culturally biased, are not culturally biased and are valid for the purpose utilized. The United States also seeks evaluation by defendants of each black child already placed in public school EMR classes and that each such child be accorded the remedial education necessary to provide him an opportunity to function in regular classes.

B. COMMITMENT

GEORGIA: Parham, et al. v. J.L. and J.R., 412 F. Supp. 112, 412 F. Supp. 141 (M.D. Ga. 1976), ___ U.S. ___ (Jan. 16, 1978).

Oral argument was held in the United States Supreme Court on December 6, 1977. On January 16, 1978, the Court ordered that the case be reheard during the next term.

ILLINOIS: In re Whitehouse,* No. 76-220 (Ill. App. Ct., Dec. 23, 1977).

On December 23, 1977, the Appeals Court for Illinois reversed the mental commitment of a mentally retarded person found unfit to stand trial on a charge of reckless homicide.

The appellate court held that in a civil commitment hearing the state must prove by clear and convincing evidence two facts: (1) that a person is suffering from a mental illness, and (2) that he is in need of mental treatment, either because he is unable to care for himself or because he is dangerous to himself or others. In addition, the court held that the state must produce an explicit medical opinion, derived from direct observation of the person to be committed, and that both the facts upon which the medical opinion is based as well as the opinion testimony itself must be established by clear and convincing evidence.

VERMONT: Frederick v. Yancer [Mulcahy], Civil No. 76-257 (D. Vt., filed December 16, 1976).

Following the filing of the complaint, plaintiffs initiated discovery and moved for class certification. Defendants countered with a motion to dismiss. In their motion, defendants claimed that plaintiffs failed to state a case or controversy since neither of the named plaintiffs had actually had their conditional discharge revoked. Defendants further claimed that plaintiffs were required to exhaust state remedies pursuant to the Supreme Court's decision in Preiser v. Rodriguez, 411 U.S. 475 (1973). Finally, defendants moved to dismiss the cruel and unusual punishment count in the complaint on the basis of the Supreme Court's decision in Ingraham v. Wright, 45 U.S.L.W. 4365.

On March 17, 1978, the Federal District Court granted plaintiffs' motion for class certification, denied defendant's motion to dismiss the due process claims, and granted the motion to dismiss the cruel and unusual punishment claim. Unfortunately, no memorandum accompanies the court's written order.

Subsequent to the filing of the complaint in Frederick, the Department of Mental Health promulgated regulations which require a hearing prior to revocation of conditional discharge. Those regulations have now been implemented and resolve many of the problems which precipitated Count I of the litigation.

In addition, the 1978 session of the Vermont legislature enacted a Department-sponsored bill which requires periodic judicial reviews for all students of the Training School. The bill requires a judicial review once every two years and allows a student to request an annual review. The bill provides for appointed counsel and requires the court to examine community alternatives to the Training School. As a result of this legislation and the regulations, it appears that the parties may soon be able to settle this litigation.

C. EDUCATION

DELAWARE: Beauchamp v. Jones, No. 75-350 (D. Del., filed October 23, 1975).

Approximately a year after the institution of this suit the Delaware State Legislature passed legislation which effectively granted the relief sought by the lawsuit. No further action is contemplated.

ILLINOIS: C.S., et al. v. Deerfield Public School District #109, Civil No. 73 1 284 (Circuit Ct., 19th Judicial Circuit, Lake County, Ill.).

This action was dismissed on renewed motion of defendant. No appeal will be taken.

ILLINOIS: W.E., et al. v. Board of Education of the City of Chicago, et al., Civil No. 73 CH 6104 (Circuit Ct., Cook Cty., Ill).

Oral argument was heard on May 25, 1977. No decision has yet been handed down.

MASSACHUSETTS: Allen v. McDonough, Civil No. 14948 (Superior Ct., Mass., original contempt decision April 13, 1977).

In a judgment entered on September 28, 1977, Justice Thomas J. Morse awarded plaintiffs' counsel more than $30,000 in attorneys' fees and outlined the actions defendants must take to purge themselves of civil contempt. In April 1978, the defendants were found not to have purged themselves of contempt, and the court ordered additional compensatory programs for Boston school children denied provision of special education in accordance with the Massachusetts Special Education Law. The court then appointed a monitor to evaluate the on-going compensatory services.

NEW JERSEY: New Jersey Association for Retarded Citizens v. New Jersey Department of Human Services, No. C2473-76 (N.J. Super. Ct., Ch. Div., Hunterdon Cty., filed March 14, 1977).

The plaintiff class was certified on February 24, 1978. Trial is scheduled for late spring 1978.

NORTH CAROLINA: North Carolina Association for Retarded Children, et al. v. State of North Carolina, et al., Civil No. 3050, 420 F. Supp. 451 (E.D.N.C. 1976).

Negotiations between the parties are continuing. The negotiations focus on two areas: the education program for all mentally retarded children in North Carolina, and the conditions in the State's institutions for the retarded. A settlement in the education area has been reached and the parties are to meet shortly with the court to enter a decree. The institutions aspect of the case is still in investigation and negotiation.

TENNESSEE: Rainey v. Tennessee Department of Education, No. A-3100 (Tenn. Ct. of Appeals, December 2, 1977).

On December 2, 1977, the Tennessee Court of Appeals reversed the trial court's ruling of January 1977, which had enjoined the expenditure of all state funds for public education if all handicapped children were not receiving special education services by July 1, 1977. The Court of Appeals found that this injunctive relief was inappropriate and remanded the case for further proceedings on relief.

Concurrently, in the Chancery Court of Davidson County, relief was granted to the named intervening plaintiffs on November 29, 1977, ordering the defendants to provide them with appropriate special education services in the county of their foster home residency by January 1, 1978. Although the trial court did not state expressly the legal basis for this ruling, several bases were argued by the plaintiffs: the right to an education in the least restrictive environment; the right to appropriate special education services as mandated by the previous orders in Rainey; and the right to live and receive educational services in a community setting to the maximum extent feasible.

D. EMPLOYMENT

CONNECTICUT: Stuart v. Nappi, et al.,* Civil No. B-77-381 (D. Conn. January 4, 1978).

The plaintiff is a high-school-aged girl described by the school as having emotional and learning problems. She had been evaluated several years ago through the Connecticut special education evaluation procedure, found to have special education needs, and recommended to receive special education services. She received some SPED services over the past few years, but in the spring of 1977 her annual re-assessment by the SPED evaluation team concluded that she needed an intensive learning disabilities program. However, such a program has not yet been provided her during the 1977-78 school year.

In September 1977 the plaintiff was involved in a school-wide disturbance at Danbury High School. For participating in this disturbance, she was immediately suspended for a period of ten days. The school also notified her that at the superintendent's urging a hearing would be held on November 30, 1977 to determine whether she would be permanently expelled from school. Two weeks before her November expulsion hearing, but after the initial suspension, plaintiff's attorney requested, pursuant to P.L. 94-142, a due process hearing to review the school's failure to provide her an appropriate special education program as recommended by the evaluation team. Thereafter, a complaint and motion for temporary restraining order were filed in federal court, seeking to enjoin the school's explusion hearing. Plaintiff claimed that P.L. 94-142 requires that she remain in her school program pending the outcome of the due process hearings and appeals, and that expulsion would be in violation of the federal law. The court granted a TRO and, following a hearing in December, issued a preliminary injunction on January 4, 1978, requiring an immediate evaluation of the child's educational needs and enjoining the explusion hearing.

The court's opinion, granting plaintiff a preliminary injunction, holds:

1. An explusion from school would very likely cause her irreparable injury.

2. She has a right to an appropriate public education under P.L. 94-142

3. a. Once a request is made for a hearing pursuant to P.L. 94-142 to challenge the appropriateness of an educational program, the federal law prohibits a change in educational placement without parental consent until the P.L. 94-142 procedures and any court review have been fully exhausted.

   b. An expulsion from school represents such an impermissible change in educational placement.

4. The P.L. 94-142 requirement that children be educated in the least restrictive setting means that, even after the procedures referred to above have been exhausted, a child who is handicapped cannot be expelled from school. These children have a federal right to be placed in an appropriate acadmic and social environment. While some disruptive or severely handicapped children may need programs located outside the regular class, expulsion is not an appropriate or permissible placement because it is not least restrictive.

5. Any transfer from the regular program to a more restrictive (or segregated/separated) environment must be done pursuant to the P.L. 94-142 process -- i.e., by a professional evaluation team working closely with the child's parent and in conformance with the due process safeguards by which a parent can challenge an educational placement decision -- not by an expulsion hearing.

6. The school is permitted to suspend a handicapped child, but only for up to ten days and only in emergency situations -- i.e., where the child is dangerous to himself or others.

In short, the court has resolved a conflict between P.L. 94-142 and local disciplinary procedures in favor of the federal law. Though the plaintiff offered some expert testimony at the preliminary injunction hearing that her "anti-social" behavior was caused by her inappropriate educational program, the court did not rely on this nor limit P.L. 94-142's application to situations in which the action the school seeks to discipline is caused by a child's handicap. In a gesture toward the schools, the court did, however, conclude its opinion as follows:

> "Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, [a school evaluation team] can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools

with both short-term and long-term methods for dealing with handicapped children who are behavioral problems."

NEW JERSEY: Schindenwolf v. Klein, Civil No. L-41293-75 PW (Superior Ct., N.J., filed June 25, 1976).

After a trial was originally set in this matter, trial was postponed due to illness on the part of one of the defense counsel. The parties are currently awaiting the setting of a new trial date.

TENNESSEE: Townsend v. Clover Bottom Hospital and School, No. A-2576 (Chancery Court, Nashville, Tenn. 1974). Denial of defendants' motion to dismiss affirmed, 513 S.W.2d 505 (Tenn. Supreme Court 1974), appeal dismissed and certiorari denied June 9, 1975, case remanded to Chancery Court.

Following dismissal of the case by the Chancery Court of Davidson County in 1976, plaintiffs appealed to the Supreme Court of Tennessee. In this appeal plaintiffs conceded that National League of Cities v. Usery invalidated the 1974 amendments to the FLSA concerning applicability of minimum wages to state employees, but argued that it did not invalidate the 1966 amendments. They argued that "the limited number of state employes covered by the 1966 amendments should not involve the Supreme Court's concern of federal intervention upon state sovereignty whereas coverage of most public employees, enacted in 1974, obviously triggered that concern," and that the 1966 amendments "may be upheld as a valid exercise of the spending power of Congress...or...as a enforcement tool for the rights, privileges and immunities of a 'suspect class' under Section 5 of the 14th Amendment."

The Tennessee Supreme Court, however, upheld the Chancery Court's dismissal on January 16, 1978, ruling that Usery did, in fact, invalidate the 1966 amendments. Plaintiffs are presently preparing a petition of certiorari to the United States Supreme Court.

E. GUARDIANSHIP

ILLINOIS: Rud v. Dahl, No. 77 C 2361 (N.D. Ill., Sept. 7, 1977).

This case was scheduled for hearing before the 7th Circuit on April 21, 1978.

MICHIGAN: Michigan Association for Retarded Citizens, et al. v. Wayne County Probate Judge,* Civil No. 77-535 (Mich. Ct. App., Nov. 9, 1977).

Plaintiffs in this class-action suit are the Michigan Association for Retarded Citizens and two mentally retarded individuals acting through their guardians. Defendant is a probate judge in Wayne County, Michigan.

hearings began at about 10:30 a.m. and were completed at 11:15 a.m. the same day. Plaintiffs filed suit in the Wayne County Circuit Court, alleging that the manner in which the hearings were held, at Oakdale Center and at other state institutions at other times by defendant, violated the new Michigan Mental Health Code. Plaintiffs sought an order of superintending control requiring defendant to rehear all guardianship petitions for persons affected and to hold all future hearings in compliance with the Mental Health Code. The Wayne County Circuit Court declined to exercise superintending control and granted defendant's motion for summary judgment. An appeal ensued and on November 9, 1977, the Michigan Court of Appeals reversed the decision and remanded the case for further proceedings.

PENNSYLVANIA: Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974), 426 F. Supp. 1297 (E.D. Pa. 1976), 558 F.2d 150 (3d Cir. 1977).

On February 10, 1978, the district court ordered that all funds plus the accrued interest be released to the plaintiffs along with bills for care and maintenance at the institution. The parties have also entered into a stipulation wherein they agreed: (1) that no patient would be deprived of his property without court authorization; (2) that the non-custodial staff would assist those patients who had not been declared incompetent in managing their property; (3) that the patients who have not been declared incompetent would be billed for the costs of their care and maintenance; and (4) that interest would be applied to the withheld funds at the annual interest rate of five percent from September 1975 to the present.

F. LIMITATION ON TREATMENT

MASSACHUSETTS: Superintendent of Belchertown State School v. Saikewicz (previously reported as Jones v. Saikewicz), No. 711 (Mass. Sup. Jud. Ct., Nov. 28, 1977).

Since the previously reported opinion of the Massachusetts Supreme Judicial Court, affirming the probate court's order that it was in the defendant-patient's best interests not to receive chemotherapy, the patient (Mr. Saikewicz) has died. In a new order issued November 28, 1977, the appeals court outlined a framework for decision-making in similar cases in the future which raise questions concerning the right of any person, competent or incompetent, to decline potentially life-prolonging treatment; the legal standards governing the decision whether life-prolonging (as opposed to life-saving) treatment should be administered to an incompetent person; and the procedural protections required of such decision-making. The appeals court held that the need

with incurable diseases, even though withholding such treatment might contribute to the shortening of the patient's life.

Specifically, the Massachusetts Supreme Judicial Court held as follows:

> "The current state of medical ethics is that physicians 'should not use extraordinary means of prolonging life or its semblance when, after careful consideration, consultation, and the application of the most well conceived therapy, it becomes apparent that there is no hope of recovery for the patient.' Recovery should be defined as meaning life without intolerable suffering. The decision in this case is consistent with the current medical ethos in this area.
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> * * *
>
> "Applying these considerations to the decision made by the probate judge, we are satisfied that his decision was consistent with a proper balancing of applicable state and individual interests. The state interests in protection of third parties and prevention of suicide are inapplicable to this case. The third, involving protection of ethical integrity of the medical profession, has been satisfied on two grounds. The fourth state interest, preservation of life, has been viewed with proper regard for the heavy physical and emotional burdens on the patient if a vigorous regimen of drug therapy were to be imposed to effect a brief and uncertain delay in the natural process of death. We cannot say that the facts of this case required a result contrary to that reached by the probate judge.
>
> "We recognize a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right extends to the case of an incompetent as well as a competent patient.
>
> * * *
>
> "The ward in this case was profoundly mentally retarded. His mental state was a cognitive one, but limited in his capacity to comprehend and communicate. The ward had a mental age of approximately two years and eight months with an I.Q. of 10. Unlike most people, he had no capacity to understand his present situation or his prognosis. An inquiry into what a majority of people would do in circumstances that truly were similar assumes an objective viewpoint not far removed from a 'reasonable person' inquiry. While we recognize the value of

needs of the individual involved. This may or may not conform to what is thought wise or prudent by most people."

G. PROTECTION FROM HARM

MICHIGAN: Karolak v. Dempsey, No. 77-18 (Mich. Ct. of Appeals, October 27, 1977).

A writ of mandamus was sought in this suit directing defendants (a) to fulfill their legal duty to take action to prevent alleged abuse and neglect of children at Plymouth Center for Human Development, Northville, Michigan, and (b) to fulfill their legal duty under the State's Child Care Institutions Act to regulate state/public mental retardation facilities by promulgation of administrative rules under the Act.

The Court of Appeals held on October 27, 1977, that the Michigan Department of Social Services' duties under the Child Care Organization Act applied to State Department of Mental Health Institutions for mentally retarded children. Defendants were ordered to establish the ad hoc committee rule promulgation process mandated by the statute, and to evaluate Plymouth Center once the rules were promulgated. The court held further that defendants had a duty to prevent further abuse and to take corrective action. It ordered an evidentiary hearing to be held at the Wayne County Circuit Court to determine what actions defendants had taken or planned to take. Two days of hearings were held on December 12 and 13, 1977. A decision is pending.

This matter has since been brought to Federal court in a companion case, Michigan Association for Retarded Citizens, et al. v. Smith, et al. (see discussion below).

MICHIGAN: Michigan Association for Retarded Citizens, et al. v. Smith, et al.,* Civil No. 870384 (S.D. Mich., filed Feb. 21, 1978).

Plaintiffs in this protection-from-harm suit are the Michigan Association for Retarded Citizens, the Plymouth Association for Retarded Citizens and parents of mentally retarded residents of Plymouth Center, Northville, Michigan. Defendants are the Director of the Michigan Department of Mental Health, the Regional Director and the facility director.

A preliminary injunction was agreed to by defendants and entered by Judge Joiner on March 3, 1978. It provides for certification as a class action, halting all new admissions until further order of the court; compliance with ICF/MR staffing ratios (with one minor exception which establishes a higher ratio for four buildings); establishment of a

mentation of an accountability system for direct-care staff; and other provisions. Further relief sought by plaintiffs includes staff training, medical care and community placement.

NEW YORK: New York State Association for Retarded Children v. Carey [Willowbrook], 393 F. Supp. 714 (E.D.N.Y. 1975), 357 F. Supp. 752 (E.D.N.Y. 1973).

On March 21, 1978, the court granted plaintiffs' motion for reasonable attorneys' fees.

H. STERILIZATION

DISTRICT OF COLUMBIA: Relf v. Weinberger; National Welfare Rights Organization, et al. v. Weinberger, et al., 372 F. Supp. 1196 (D.D.C. 1974), 403 F. Supp. 1235 (D.D.C. 1974), 565 F.2d 722 (D.C. Cir. 1977).

The Department of Health, Education and Welfare published proposed regulations on sterilizations financed by HEW-funded programs on December 13, 1977, 42 Fed. Reg. 62718, with a 90-day comment period. Final regulations are expected towards the end of May.

INDIANA: Stump v. Sparkman, 552 F.2d 172 (7th Cir. 1977), ___ U.S. ___ (March 28, 1978).

On March 28, 1978, the Supreme Court issued its opinion in this case, holding that Indiana law vested in the circuit judge the power to entertain an act upon the petition for sterilization and that he was, therefore, immune from damages liability even if his approval of the petition was in error. Justice White delivered the opinion of the Court, in which Chief Justice Burger and Justices Blackmun, Rehnquist and Stevens joined.

The reasoning by the majority was as follows: Under settled law, a judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." In this case there was not "clear absence of all jurisdiction" in the circuit court to consider the sterilization petition. That court had jurisdiction under the Indiana statute granting it broad general jurisdiction, it appearing neither by statute nor by case law had such jurisdiction been circumscribed to foreclose consideration of the petition. The factors determining whether an act by a judge is "judicial" relate to the nature of the act itself

judge's approval of the sterilization petition was a judicial act, even though he may have proceeded with informality. Disagreement with the action taken by a judge does not justify depriving him of his immunity, and thus the fact that in this case tragic consequences ensued from the judge's action does not deprive him of his immunity. Moreover, the fact that the issue before the judge is a controversial one, as here, is all the more reason that he should be able to act without fear of suit.

Justice Stewart filed a stinging dissent, in which Justices Marshall and Powell joined (Justice Brennan took no part in the consideration or decision of the case). According to Justice Stewart, "What Judge Stump did...was beyond the pale of anything that could sensibly be called a judicial act....And if the limitations inherent in that concept have any realistic meaning at all, then I cannot believe that the action of Judge Stump in approving Mrs. McFarland's petition is protected by judicial immunity."

> "The Court finds two reasons for holding that Judge Stump's approval of the sterilization petition was a judical act. First, the Court says it was a 'function normally performed by a judge.' Second, the Court says, the act was performed in Judge Stump's 'judicial capacity.' With all respect, I think that the first of these grounds is factually untrue and the second is legally unsound.
>
> "[F]alse illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act. In short, a judge's approval of a mother's petition to lock her daughter in the attic would hardly be a judicial act simply because the mother had submitted her petition to the judge in his official capacity....[T]he conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."

Among the grounds for characterizing what Judge Stump did as "not a judicial act" Justice Stewart noted that the petition was not given a docket number, was not placed on file with the clerk's office and was approved in an ex parte proceeding without notice to the minor, without a hearing, and without appointment of a guardian ad litem, and that because the sterilization order was irreversible, there was no possibility of changing Judge Stump's erroneous ruling on appeal.

[illegible] (subsequent citations omitted).

On April 12, 1978, Judge Johnson ordered that defendants' alternative motions to dismiss or for summary judgment addressed to motions for an amended medication standard and for appointment of a special master be denied. Discovery in the case, insofar as it relates to Alabama's mental retardation facilities, was reopened, and the parties were granted until April 1, 1978, to complete discovery. Plaintiffs' and amici's motions for further relief and for appointment of a special master, as well as the motion of amicus curiae United States for an amended medication standard, were set for a hearing on their merits on August 15, 1978.

DISTRICT OF COLUMBIA: Evans and the United States v. Washington, et al., Civil No. 76-0293 (D.D.C., filed January 23, 1976).

On January 28, 1977, Judge Pratt granted the motion of the United States to change its status from amicus to plaintiff-intervenor. Extensive discovery has been conducted. On November 1, 1977, plaintiffs filed a Motion for Partial Summary Judgment as to liability. The United States filed a supporting memorandum on December 15, 1977. Defendants served a memorandum in opposition on December 27, 1977, to which plaintiffs responded on February 8, 1978.

The court indicated orally to counsel at a status conference on February 17, 1978, that it was inclined to grant the plaintiffs' Motion for Partial Summary Judgment. The court requested that parties submit proposed orders for relief and proposed findings of fact and conclusions of law by April 1. On March 31, 1978, the United States filed a proposed order, memorandum in support and proposed findings of fact and conclusions of law. The United States seeks injunctive relief to provide habilitation for Forest Haven residents in the least restrictive settings commensurate with their individual assessments and to safeguard residents from harm during the interim period of deinstitutionalization. An important aspect of the proposed order is appointment of a Special Master to assist defendants to plan, implement and monitor the relief required. Defendants filed their proposed order and memorandum in opposition to the United States' proposed order on April 13, 1978.

At a status conference on April 14, the Court scheduled a hearing for May 15, 16 and 17 to hear testimony on the necessity for a Special Master.

FLORIDA: Donaldson v. O'Connor, 422 U.S. 563 (1975).

A hearing on criteria for assessing reasonable attorneys' fees was held, after rescheduling, on March 2, 1978. No order has yet been issued.

On August 30, 1977, Judge Charles Allen entered a one-line Order summarily denying the State defendants' Motion to Dismiss. Although the State defendants conceded the constitutional principles embodied in Wyatt v. Aderholt, the defendants contended that each of the named plaintiffs had a "voluntary" status which precluded his assertion of the constitutional claims to right to treatment and protection from harm. The defendants in their Motion to Dismiss also sought to dismiss the Kentucky Association for Retarded Citizens as a party on the grounds that the KARC did not meet constitutional standing criteria for associations as set forth in Warth v. Seldin, 95 S. Ct. 2197 (1975). The defendants also argued that the Federal court was without the jurisdiction to grant the equitable relief sought by the plaintiffs.

On January 24, 1978, Judge Allen entered an order certifying the suit as a class action. And on March 3, 1978 a broad discovery order was granted permitting plaintiffs access to inspect the individual and related records of the class population at Outwood. An intense discovery effort is under way.

KENTUCKY: Kentucky Association for Retarded Citizens, Inc. v. Kentucky Health Systems Agency West, Inc.,* No. C 77-0511 L(A) (W.D. Ky., Oct. 18, 1977).

Plaintiffs in this suit challenged defendants' failure to comply with the National Health Planning and Resources Act, 42 U.S.C. § 300k, and accompanying regulations regarding the proposed construction of a facility for mentally retarded citizens.

Under this Act the defendant Comprehensive Health Planning Council is the State Health Planning and Development Agency, and is required by statute to consider recommendations made by the Health Systems Agency with regard to the need for new institutional health services proposed to be offered. The relevant federal regulations, 42 C.F.R. § 112.306(1), require that, ten days before a Health Systems Agency Board meets to consider a proposed new facility, all "affected parties" be provided written notice and an opportunity to be heard. The defendant herein failed to notify the plaintiff of its meeting wherein it considered the proposal to build a new institution for the provision of services to the mentally retarded in rural and isolated western Kentucky.

The court found that the failure to provide plaintiffs with notice of the Health Systems Agency hearing would cause them irreparable harm by denying them the opportunity to develop a record in opposition to the construction of the proposed facility. The court ordered the Kentucky Health Systems Agency to hold another hearing regarding the application to build the new facility and to provide plaintiffs with written notice at least ten days prior to the date of the hearing. The court further

hearing subsequent to the hearing to be held by the Health Systems Agency. Plaintiffs are to be provided notice of the State Comprehensive Health Planning Council hearing as well.

LOUISIANA: Gary W., et al. v. Willian Cherry, et al. (formerly Gary W. v. State of Louisiana), Civil No. 74-2412-C, 437 F. Supp. 1209 (1976), 429 F. Supp. 711 (1977).

In the October 27, 1977, opinion, the court held that the supremacy clause of the United States Constitution required the court to enforce plaintiffs' rights under 42 U.S.C. § 1988 over any contrary state constitutional provision. Then, analyzing both federal rules under which plaintiffs sought to enforce their judgment, the court held that plaintiffs could enforce their attorneys' fees award under either Rules 69 or 70. Because the state defendants had expressed to the court their desire that the award be enforced under Rule 70 (which would allow the state to select the particular funds with which to pay the judgment), the court issued its order under Rule 70 alone.

The court also rejected the state defendants' Rule 60 motion, indicating that the court had been aware that the attorneys' fees award was discretionary and that, in any event, the State had informed the court that it had no new information which would alter the original basis of the court's decision.

State defendants have taken the enforcement issue and the Rule 60 denial to the Fifth Circuit on appeal. Pending the outcome of this appeal, the State was required to place $225,000 (an amount sufficient to cover the judgment against it) in an escrow account controlled by the Clerk of the Federal District Court.

MAINE: Wouri v. Zitnay, No. 75-80-SD (S.D. Maine, filed August 22, 1975).

Negotiations seem to have stalled, and plaintiffs plan to request the court to call a status conference in an effort to facilitate agreement on a consent decree.

MARYLAND: Bauer v. Mandel, No. 22-871 (Anne Arundel County Circuit Ct., filed September 1975).

In late March the court denied defendants' motion to dismiss and granted plaintiffs' motion for leave to file more than 30 interrogatories. The court also granted, with one or two exceptions, plaintiffs' motion to compel production of documents, in particular giving plaintiffs access to all medical, psychological and social records of unnamed class members.

MARYLAND: United States v. Solomon, et al., 419 F. Supp. 358 (D. Md. 1976), ___ F.2d ___ (4th Cir., October 12, 1977).

The Justice Department has indicated that it will not seek to have the Supreme Court review this case.

MASSACHUSETTS: Brewster v. Dukakis, No. 76-4423-F (D. Mass., filed March 15, 1977).

After filing a comprehensive set of interrogatories in March 1977, the plaintiffs moved to certify the class and to add the Massachusetts Association for Retarded Citizens and the Massachusetts Association for Mental Health as co-plaintiffs. In addition, the plaintiffs requested that the United States Department of Justice be invited to participate as amicus curiae. The defendants opposed all these motions and requested that the court abstain and certify questions of state law to the Supreme Judicial Court of Massachusetts.

At a hearing in August 1977 the Federal court allowed the intervention motions of MAMH and MARC but delayed action on the request to invite the Justice Department to participate, pending an offer of settlement by the defendants. Because no settlement negotiations had begun by October, the plaintiffs renewed their Justice Department request at a second hearing held in October. The court overrode the defendants' motions to subdivide the class and certified the class as defined by the plaintiffs. It further ordered that all interrogatories be answered in 30 days and that negotiations begin within 60 days. It refused at that time to act on the Justice Department motion but agreed to reconsider it at any time should negotiations break down.

After extensive discussions with the defendants on the content and agenda for negotiations, the parties began meeting on a bi-weekly basis to design the relief requested in the plaintiffs' Complaint. To date, these negotiations have proved productive, although it is still unclear what commitments the defendants will make to implement the plan.

MINNESOTA: Welsch v. Dirkswager, 373 F. Supp. 487 (D. Minn. 1974), 550 F.2d 1122 (8th Cir. 1977).

The proposed consent decree presented to the district court on December 28, 1977 (see January 1978 issue of MR & the Law), was approved by the court. This decree concerned only Cambridge State Hospital.

No effective response was made by the 1978 session of the Minnesota legislature with respect to four other institutions involved in the case. Plans are under way for discovery and trial preparation with a target of a trial in late 1978.

Trial in this action is currently scheduled for summer 1978.

MISSOURI: Caswell v. Califano, No. 77-0488 CV-W-4 (W.D. Mo., filed June 30, 1977).

The court has yet to rule on the State defendants' motion to dismiss. In the interim, discovery is proceeding and plaintiffs have submitted to State defendants a proposed stipulation for certification of the class.

MONTANA: United States v. Mattson, Civil No. 74138 (D. Mont., Sept. 29, 1976), appeal docketed, No. 76-3568 (9th Cir., Dec. 3, 1976).

Oral argument still has not yet been scheduled.

NEBRASKA: Horacek and the United States v. Exon, 357 F. Supp. 71 (D. Neb. 1973), consent decree October 31, 1975, amended consent decree February 10, 1978.

On February 10, 1978 the court amended the consent decree entered October 31, 1975 to establish a three-person panel in place of the original five-person panel. The original panel, although appointed, was never funded by defendants and did not function. The new panel members, Dr. Paul Pearson, M.D. (Chairperson), Jerome Griepentrog, State Co-ordinator of Mental Retardation Services, and Kevin Casey, Executive Director of ENCOR (Eastern Nebraska Community Office of Retardation), are to develop by the fall of 1978 a plan of implementation of the consent decree. The plan is to be submitted for approval of the parties and the court.

NEW JERSEY: In re C.S., Docket No. NHCC 11-75 (Hunterdon County, N.J., April 18, 1977).

The New Jersey Supreme Court has granted certification. The cross-motions are presently scheduled for oral argument on May 22, 1978.

OHIO: Barbara C., et al. v. Moritz, et al., No. C 2-77-887 (S.D. Ohio, filed November 17, 1977).

Defendants have filed Answers to the Complaint in this case. Plaintiffs have filed a Motion for Class Certification and are proceeding with discovery.

PENNSYLVANIA: Halderman and the United States v. Pennhurst State School and Hospital, Civil No. 74-1345 (E.D. Pa., December 23, 1977 and March 17, 1978).

The court held in its December 23, 1977 opinion that residents of Pennhurst have a right under the due process clause of the 14th Amendment to

Amendment prohibits segregation of mentally retarded persons in an institution which does not meet minimally adequate standards and that defendants have violated the anti-discrimination provisions of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The court found that § 504 confers a private right of action, that it imposes affirmative obligations on state and local government officials, and that under § 504 unnecessarily different or separate services are discriminatory and unlawful.

In his order dated March 17, 1978, Judge Broderick provided for the appointment of a Special Master and delineated the duties and authority of such a master, including, inter alia, the planning, organization, direction, supervision, and monitoring of the injunctive relief ordered. The court ordered defendants to provide suitable community living arrangements and services to class members and to provide individualized habilitation plans and programs. The court also ordered injunctive relief to protect Pennhurst residents from physical and psychological harm.

The court is in the process of interviewing candidates for the position of Special Master.

On April 13, 1978, Judge Broderick heard argument on defendants' motion for a stay of the order for relief. No decision has been rendered. State defendants and four of the five county defendants are seeking an expedited appeal to the Third Circuit.

J. ZONING

OHIO: Village of Walbridge v. State of Ohio, et al.,* No. 78-CIV-37 (Common Pleas Ct., Wood Cty., Ohio, filed Feb. 22, 1978).

Plaintiff in this case is a municipal corporation, the Village of Walbridge. Defendants include the State of Ohio, the Ohio Department of Mental Health and Mental Retardation and the Wood County Board of Mental Retardation.

The Wood County Board of Mental Retardation has been attempting to establish family houses for mentally retarded persons throughout Wood County for the past two years. In this instance they were attempting to establish a family home (i.e., a residence comprised of 8 mentally retarded individuals and 2 house parents) in an area zoned for single-family dwellings. A Walbridge zoning ordinance enacted June 13, 1977 defines a single-family dwelling as one occupied exclusively by one family and defines family as: "One (1) or more persons related by blood, marriage or adoption, or no more than two (2) unrelated persons." However, in July 1977, the Ohio General Assembly passed § 5213.18 of the

The Village of Walbridge then filed a complaint for declaratory and injunctive judgment, seeking declaratory judgment that § 5123.18 is unlawful, and an injunction prohibiting defendants from maintaining and operating a family home there.

VIRGINIA: INSIGHT, Inc., et al. v. City of Manassas, et al.,* Civil No. 78-255A (E.D. Va., filed April 17, 1978).

Robert Platt, of Manassas, Virginia, has lived at the Northern Virginia Training Center, a Fairfax institution for the mentally retarded, since 1957. Along with Charles Davis, another mildly retarded person who has lived at the Center since 1964, Pratt was cleared by the institution's staff on May 31, 1977 to move into a group home in Manassas. The home was to be established and operated by INSIGHT (Incentive for Normal Social Interaction Group Homes Today), a nonprofit corporation which has a contract with Prince William County to run supervised group homes for the mentally retarded.

But, according to the complaint in this case, almost a year later Pratt and Davis still have to live in the institution because the Manassas city government "thwarted and delayed...at every turn" efforts to provide suitable community living for them.

The suit for injunctive relief and damages charges the Manassas mayor and city council with demonstrating an unconstitutional "pattern of discrimination" against Pratt and Davis simply because they are mentally retarded. The suit also seeks to close a loophole in a Virginia State law which forbids exclusion of mentally retarded persons "from the benefits of normal residential surroundings" but which may allow local governments to keep group homes out of residential neighborhoods on the pretext of setting excessive health and safety requirements.

The complaint lists a series of actions by which Manassas officials "have consciously and affirmatively thwarted" INSIGHT's efforts since July 1977 to open a supervised group home for six mildly retarded adults.

A. ARCHITECTURAL BARRIERS

Alabama: Snowdon v. Birmingham-Jefferson County Transit Authority, No. 75-G-330-S (N.D. Ala., June 24, 1975).

District of Columbia: Washington Urban League, Inc., et al. v. Washington Metropolitan Area Transit Authority, Inc., Civil No. 776-72 (D.D.C. 1976).

Maryland: Disabled in Action of Baltimore, et al. v. Hughes, et al., Civil Action No. 74-1069-HM (D. Md.).

Ohio: Friedman v. County of Cuyahoga, Case No. 895961 (Court of Common Pleas, Cuyahoga County, Ohio), consent decree entered November 15, 1972.

B. CLASSIFICATION

Illinois: People of the State of Illinois v. Donald Lang, No. 76 Crim. 064 (Cir. Ct., Cook County, October 11, 1977).

Louisiana: Lebanks, et al. v. Spears, et al., consent decree, 60 F.R.D. 135 (E.D. La. 1973).

Massachusetts: Stewart, et al. v. Philips, et al., Civil Action No. 70-1199-F (D. Mass), filed September 14, 1970).

C. COMMITMENT

District of Columbia: Poe v. Califano, No. 74-1800 (D.D.C., filed December 10, 1974).

District of Columbia: United States v. Shorter (Superior Ct., D.C., November 13, 1974). No. 9076, (D.C. Ct. of Appeals, August 26, 1975).

Indiana: Jackson v. Indiana, 406 U.S. 715 (1972).

Michigan: White v. Director of Michigan Department of Mental Health, No. 75-10022 (E.D. Mich., filed August 6, 1975).

West Virginia: State ex rel. Miller v. Jenkins, No. 13340 (Supreme Ct. of Appeals, W.Va. at Charleston, March 19, 1974).

Wisconsin: State ex rel. Matalik v. Schubert, 47 Wis.2d 315, 204 N.W.2d 13 (Supreme Ct., Wis. 1973).

Wisconsin: State ex rel. Haskins v. County Court of Dodge County, 62 Wis.2d 250, 214 N.W.2d 575 (Supreme Ct., Wis. 1974).

D. CRIMINAL LAW

District of Columbia: United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

Georgia: Pate, et al. v. Parham, et al., Civil No. 75-46 Mac. (M.D. Ga., September 19, 1975).

Louisiana: Louisiana v. Bennett, No. 58,536 (La. Sup. Ct., filed April 4, 1977).

E. CUSTODY

Georgia: Lewis v. Davis, et al., Civil Action No. D-26437 (Superior Ct., Chatham County, Ga.,July 19, 1974.

Iowa: In the Interest of Joyce McDonald, Melissa McDonald, Children, and the State of Iowa v. David McDonald and Diane McDonald, Civil Action No. 128/55162 (Iowa Supreme Court, October 18, 1972).

Iowa: In the Interest of George Franklin Alsager, et al. and the State of Iowa v. Mr. and Mrs. Alsager, Civil Action No. 169/55148 (Iowa Supreme Court, October 18, 1972).

F. EDUCATION

Arizona: Eaton v. State of Arizona, Civil No. 329028 (Superior Court of Maricopa Cty., Arizona, filed Dec. 10, 1975).

California: California Association for Retarded Children v. State Board of Education, No. 237277 (Superior Ct., Sacramento County, filed July 27, 1973).

California: California Association for Retarded Citizens v. Riles, No. C77-0341 (N.D. Cal., filed February 15, 1977).

California: Case, et al. v. State of California, Civil Action No. 101679 (Superior Ct., Riverside County).

California: Crowder v. Riles, No. CA 000384 (Super. Ct., Los Angeles Cty., Dec. 20, 1976).

Colorado: Colorado Association for Retarded Children v. The State of Colorado, Civil Action No. C4620 (D. Colo.).

Connecticut: Connecticut Association for Retarded Citizens v. State Board of Education, Civ. No. H77-122 (D. Conn., filed March 10, 1977).

Connecticut: Kivell v. Nemeitan, et al., No. 143913 (Superior Ct., Fairfield County, Conn., July 18, 1972).

District of Columbia: Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (U.S. D. Ct., D.C. 1972). Supplemental Orders on Contempt and Master, March and July, 1975.

Florida: Florida Association for Retarded Children, et al. v. State Board of Education, Civil Action No. 730250-CIV-NCR (S.D. Fla.).

Florida: Florida ex rel. Stein v. Keller, No. 73-28747 (Circuit Ct., Dade County, Fla.).

Florida: Florida ex rel. Grace v. Dade County Board of Public Instruction, No. 73-2874 (Cir. Ct., Dade County, Fla.).

Georgia: David v. Wynne, Civil No. LU-176-44 (S.D. Ga. 1976).

Indiana: Dembowski v. Knox Community School Corporation, et al., Civil No. 74-210 (Starke County Ct., Ind., filed May 15, 1974).

Indiana: Sonnenburg v. Bowen, No. 74 P.S.C. 1949 (Porter Cty. Cir. Ct., Ind., filed October 9, 1974).

Kentucky: Kentucky Association for Retarded Children v. Kentucky, No. 435 (E.D., Ky.), consent decree, November, 1974.

Maryland: Maryland Association for Retarded Children, Leonard Bramble v. State of Maryland, Civil Action No. 720733-K (D. Md.). In the Maryland State Court, Equity No. 77676 (Circuit Ct. for Baltimore County, April 9, 1974).

Michigan: Harrison, et al. v. State of Michigan, et al., Civil Action No. 38557 (E.D., Michigan).

New Hampshire: Swain v. Barrington School Board, No. Eq. 5750 (Superior Ct., New Hampshire, March 12, 1976).

New York: In the Matter of Tracy Ann Cox, Civil No. H4721-75 (N.Y. Family Ct., Queens County, April 8, 1976).

New York: In the Matter of Richard G (N.Y. Sup. Ct., App. Div., 2nd Dept., May 17, 1976).

New York: Reid v. Board of Education of the City of New York, No. 8742 (Commission of Education for the State of New York, decided November 26, 1973). Federal Court Abstention Order, 453 F.2d 238 (2d Cir. 1971).

North Carolina: Hamilton v. Riddle, Civil Action No. 72-86 (Charlotte Division, W.D., N.C.).

North Dakota: In re G.H., Civil Action No. 8930 (Supreme Ct., N.D., April 30, 1974).

North Dakota: North Dakota Association for Retarded Children v. Peterson (D.N.D., filed November 1972).

Ohio: Cuyahoga County Association for Retarded Children and Adults, et al. v. Essex, No. C 74-587 (N.D. Ohio, April 5, 1976).

Pennsylvania: Fialkowski v. Shapp,405 F. Supp. 946 (E.D. Pa. 1975).

Pennsylvania: Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al., 344 F. Supp. 1275 (3-judge Court, E.D., Pa. 1971).

Rhode Island: Rhode Island Society for Autistic Children, Inc., et al. v. Board of Regents for Education of the State of Rhode Island, et al., Civil Action File No. 5061 (D.R.I.), sipulations signed September 19, 1975.

Virginia: Kruse, et al. v. Campbell, et al., Civil No. 75-0622-R (E.D. Va., filed December 1, 1975).

Washington: Rockafellow, et al. v. Brouillet, et al., No. 787938 (Superior Ct., King County, Wash.).

West Virginia: Doe v. Jones (Hearing before the State Superintendent of Schools, January 4, 1974).

Wisconsin: Marlega v. Board of School Directors of City of Milwaukee, Civil Action No. 70C8 (E.D.,Wis.), consent decree, September, 1970.

Wisconsin: Panitch, et al. v. State of Wisconsin, Civil Action No. 72-L-461 (D. Wis.).

Wisconsin: State of Wisconsin ex rel. Warren v. Nusbaum, ___ Wisc.2d ___, 219 N.W.2d 577 (Supreme Ct., Wis. 1974).

Wisconsin: Unified School District No. 1 v. Barbara Thompson, Case No. 146488 (Cir. Ct., Dane Cty.). Memorandum Decision, May 21, 1976.

G. EMPLOYMENT

District of Columbia: National League of Cities v. Usery, 426 U.S. 833 (1976).

District of Columbia: Souder, et al. v. Brennan, et al., 367 F. Supp. 808 (D.D.C. 1973).

Florida: Roebuck, et al. v. Florida Department of Health and Rehabilitation Services, et al., 502 F.2d 1105 (5th Cir. 1974).

Indiana: Sonnenburg v. Bowen, Civil No. P.S.C. 1949 (Porter Cty. Cir. Ct., Ind., filed October 9, 1974).

Iowa: Brennan v. State of Iowa, 494 F.2d 100 (8th Cir. 1973).

Maine: Jortberg v. Maine Department of Mental Health, Civil Action No. 13-113 (D. Maine), consent decree, June 18, 1974.

Massachusetts: Smith and Doe v. United States Postal Service, Civil No. 76-2452-S (D. Mass., filed June 21, 1976).

Michigan: Schultz v. Borradaile, Civil No. 74-40123 (E.D. Mich., filed Oct. 25, 1974).

Michigan: Todd and Baldridge v. Smith, No. 74-40123 (E.D. Mich., Jan. 21, 1977).

Missouri: Employees of the Department of Public Health and Welfare, State of Missouri v. Department of Public Health and Welfare of the State of Missouri, 411 U.S. 279 (1973).

Montana: Littlefield v. State of Montana, Civil No. 38794 (1st Jud. Dist., Montana, October 1, 1976).

Ohio: Souder v. Donahey, et al., No. 75222 (Supreme Ct., Ohio).

Ohio: Walker v. Gallipolis State Institute, Case No. 75CU-09-3676 (Court of Common Pleas, Franklin County, Ohio), dismissed September 8, 1976.

Tennessee: Townsend v. Treadway, Civil Action No. 6500 (M.D. Tenn.), decided September 21, 1973.

Wisconsin: Weidenfeller v. Kidulis, 380 F. Supp. 445 (E.D. Wis. 1975).

H. GUARDIANSHIP

Connecticut: Albrecht v. Tepper, Civil No. H-263 (D. Conn., February 10, 1977).

Connecticut: McAuliffe v. Carlson, 377 F. Supp. 869 (D. Conn. 1974), supplemental decision, 386 F. Supp. 1245(D. Conn. 1975).

I. PROTECTION FROM HARM

New York: Rodriguez v. State, 355 N.Y.S.2d 912 (Court of Claims 1974).

Pennsylvania: Janet D. v. Carros, No. 1079-73 (Court of Common Pleas, Allegheny County, Pa.), decided March 29, 1974.

Pennsylvania: Romeo v. Youngberg, Civil No. 76-3429 (E.D. Pa., filed November 1976).

J. STERILIZATION

Alabama: Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1972).

California: In re Kemp, 43 Cal. App. 3d 758 (Court of Appeals, 1974).

Missouri: In re M.K.R., 515 S.W.2d 467 (Supreme Ct., Mo. 1974).

North Carolina: Cox v. Stanton, et al., Civil No. 800 (E.D.N.C., filed January 8, 1974).

North Carolina: In re Moore, 221 S.E.2d 307 (N.C. Supreme Ct., 1976).

North Carolina: Trent v. Wright (E.D.N.C., filed Jan. 18, 1974).

Tennessee: In re Lambert, Civil No. 61156 (Tenn. Prob. Ct., Davidson County, March 1, 1976).

Wisconsin: In re Mary Louise Anderson (Dane County Court, Branch I, Wis., November 1974).

K. TREATMENT

Alabama: Pugh v. Locke and James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976).

District of Columbia: Dixon v. Califano [Weinberger], 405 F. Supp. 794 (D.D.C. 1975).

California: Revels, et al. v. Brian, M.D., et al., No. 658-044 (Superior Ct., San Francisco).

Georgia: Burnham v. Department of Health of the State of Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), 503 F.2d 1319 (5th Cir. 1974), cert. denied, ___ U.S. ___, 43 U.S.L.W. 3682 (1975).

Hawaii: Gross v. Hawaii, Civil No. 43090 (Cir. Ct., Hawaii). Consent decree, February 3, 1976.

Illinois: Nathan v. Levitt, No. 74 CH 4080 (Circuit Ct., Cook County, Ill.), consent order, March 26, 1975.

Illinois: Rivera, et al. v. Weaver, et al., Civil Action No. 72C135.

Illinois: Wheeler, et al. v. Glass, et al., 473 F.2d 983 (7th Cir. 1973).

Massachusetts: Gauthier v. Benson, Civil No. 75-3910-T (D. Mass.).

Massachusetts: Ricci, et al. v. Greenblatt, et al., Civil Action No. 72-469F (D. Mass.), consent decree, November 12, 1973.

Michigan: Jobes, et al. v. Michigan Department of Mental Health, Civil No. 74-004-130 DC (Cir. Ct., Wayne County, Mich).

Mississippi: Doe v. Hudspeth, Civil No. J 75-36 (N) (S.D. Miss., filed February 11, 1975).

Missouri: Barnes, et al. v. Robb, et al., Civil No. 75 CV87-C (W.D. Mo., Central Division, filed April 11, 1975).

Ohio: Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1975).

Ohio: Ohio Association for Retarded Citizens v. Moritz, No. C2-76-398 (S.D. Ohio, April 19, 1977).

Pennsylvania: Roe v. Pennsylvania, No. 74-519 (W.D. Pa., filed June 9 1976).

Pennsylvania: Waller v. Catholic Social Services, No. 74-1766 (E.D. Pa.).

Tennessee: Saville v. Treadway, Civil Action No. Nashville 6969 (M.D. Tenn., March 8, 1974). Consent Decree, September 18, 1974.

Washington: Boulton v. Morris, No. 781549 (Superior Ct., King County, Wash., filed June 1974).

Washington: Preston v. Morris, Civil No. 77-9700 (Superior Ct., King County, Wash., filed April 23, 1974).

Washington: Washington v. White and Morris, No. 4350-I (Ct. of Appeals, Wash., January 31, 1977).

L. VOTING

Massachusetts: Boyd, et al. v. Board of Registrars of Voters of Belchertown, No. 75-141 (Sup. Jd. Ct., Mass., Sept. 30, 1975).

New Jersey: Carroll, et al. v. Cobb, et al, No. A-669-74 and A-1044-74 (Superior Ct., N.J., Appellate Division), decided February 23, 1976.

M. ZONING

California: Defoe v. San Francisco Planning Commission, Civ. No. 30789 (Superior Ct., Calif.).

California: Los Angeles v. California Department of Health, 2d Civil No. 48697 (Ct. of Appeals, Calif. 2d Appellate District, November 2, 1976).

Colorado: The City of Delta v. Thompson v. Nave and Redwood, No. 75-431 (Colorado Ct. of Appeals), decided December 11, 1975.

Florida: City of Temple Terrace v. Hillsborough Association For Retarded Citizens, Inc., 44 U.S.L.W. 2189 (Fla. Ct. App. 2d District), decided October 10, 1975.

Massachusetts: Zarek v. Attleboro Area Human Services, Inc., Civil No. 2540 (Superior Ct., Mass.).

Michigan: Doe v. Damm, Complaint No. 627 (E.D., Mich.).

Michigan: Michigan Association for Retarded Children v. The Village of Romeo, Civil No. 670769 (E.D. Mich.). Federal Absetntion Order, August 2, 1976. No. 76-6267-C2 (Mich. Cir. Ct., Macomb County, March 1, 1977).

Minnesota: Anderson v. City of Shoreview, No. 401575 (D. Ct., Second Judicial District, Minn.), decided June 24, 1975.

Montana: State ex rel. Thelan v. City of Missoula, No. 13192 (Supreme Ct., Montana), decided December 8, 1975.

New York: Little Neck Community Association v. Working Organization for Retarded Children (N.Y. Sup. Ct. App. Div., 2d Dept., May 3, 1976).

New York: Village of Belle Terre v. Borass, 91 S.Ct. 1536 (1974).

Ohio: Boyd v. Gateways to Better Living, Inc., Case No. 73-CI-531 (Mahoning County Court of Common Pleas).

Ohio: Driscoll v. Goldberg, Case No. 72-CI-1248 (Mahoning County Ct. of Common Pleas, Ohio), 73 C.A. 49 (Ohio Court of Appeals, 7th District), decided April 9, 1974.

Wisconsin: Browndale International, Ltd. v. Board of Adjustment, 60 Wis.2d 182, 208 N.W.2d 121 (Wis. 1973), cert. denied, 94 S.Ct. 1933 (1974).

III. FEATURE ARTICLE

THE FUTURE OF INSTITUTIONS FOR RETARDED CITIZENS

The Promise of the Pennhurst Case

by David Ferleger, Esq.

Crowded into a lounge at the Florence Heller School of Social Work at Brandeis University were about 50 mental retardation workers and a handful of state officials who had gathered to participate in a dialogue between Gunnar Dybwad and Burton Blatt, both distinguished veterans of the struggle for decent care of the retarded. Expressing the hope and frustration of those who would see an end to institutions for the retarded, one of the group -- the superintendent of a state institution in Massachusetts -- declared, "What we need is a right to community care. Perhaps when the Pennsylvania case reaches the Supreme Court . . . ." The discussion then turned to the implications of that case for the future of institutional care of retarded persons.

The "Pennsylvania case" is Halderman v. Pennhurst State School and Hospital, F.Supp. (E.D. Pa. 1977). On December 23, 1977, the court ruled that the very existence of the institution violates Federal and State law. The decision has been greeted with approval, condemnation and fear.

Advocates of full acceptance of the retarded into community life hail the recognition of a constitutional and statutory right to support the professional and political wisdoms. State officials and administrators confess to feeling assaulted and threatened as the very existence of the physical structures which manifest their authority are undermined. Parents and friends of the institutionalized retarded are fearful that new rights will bring new abuses, that the blessings of community care will be granted with the customary inequity and ineptitude of many government benefit programs.

"Would you agree with the other witnesses I've heard that it is time to sound the death knell for institutions for the retarded?" Thus spoke the Honorable Raymond J. Broderick, United States District Judge, in the sixth week of trial. These words -- soon to be emphatically echoed in the court's unprecedented opinion -- did not come easy. The judge had

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studied hard and learned well; he spent the early days of the trial listening to and interrogating expert after expert to find out whether an institution wasn't needed in the southeast corner of Pennsylvania to serve 400 people. The answer was no. For 350 people? No. One institution for the entire State? No. An institution for the most profoundly retarded with physical handicaps? Again, the answer was no. Even the superintendent of the institution told the court that there was no need to institutionalize any of the retarded at Pennhurst.

There were two major differences between the Pennhurst litigation and the many other lawsuits which have been brought against institutions for the retarded around the country in the last decade. First, unlike others where the State conceded deficiencies and agreed to improve services for the retarded, Pennsylvania State officials fought the plaintiffs with every technicality they could muster. There was no consent decree.

The second factor which made the Pennhurst case unique was the plaintiffs' blanket and uncompromised position that the institution must be closed and replaced by a network of community facilities and services. A decree requiring massive and desirable reductions in the institution's population, renovation of the physical environment and augmentation of staff would not be enough.

Our experts told us, and later the court, that community care was possible and appropriate for every resident of Pennhurst, that productive employment was feasible for most and that life outside the institution would be cheaper than life at Pennhurst. With the lawyers and litigants for the plaintiffs thus trained and educated (perhaps predisposed) to reject the mythological view that our society has of the retarded, we shaped our lawsuit and our planned presentation to the court to reflect the need for a new judicial vision of the rights of the institutionalized.*

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* Short decades ago, the progressive and enlightened professionals in mental retardation were supporting and encouraging institutionalization. Those who would keep the retarded in the hostile and non-supportive community were the "bad guys." Today, the anti-institutional advance guard has been transformed into an expert consensus that a community service system is the best for the retarded and will work. If those hopes fail to be realized, the community care proponents may again be identified as the "bad guys" in some future decade. This potentially pendulum-like process should be explored by examining the social, economic and political functions of institutionalization of the retarded, rather than focusing simply on the "therapeutic" benefits and harms of institutional care versus community care.

We wanted what the courts have called the "least restrictive alternative" form of care. Pennhurst or any other institution could not provide it. At the same time, we neither wanted people dumped into inadequate community centers nor held for years in the dangerous environment at Pennhurst.

Some Who Went to Court

In 1966, at the age of 12, Terri Lee Halderman was admitted to Pennhurst State School and Hospital in Spring City, about 30 miles from Philadelphia. During her 11 years at the institution, her jaw was broken, fingers and a toe fractured, and her body cut, bitten and bruised dozens of times. In 1966, Halderman could say a few words; while at Pennhurst, she stopped speaking.

A social welfare agency committed George Sorotos to Pennhurst in 1970 when he was seven years old. His foster mother has visited him every week for these seven years and found him injured on all but four visits. Recently, Sorotos has been found with what appear to be cigarette burns on his chest.

Nancy Beth Bowman is 27 years old. At Pennhurst, she was beaten by a staff member with a shackle belt and abused by staff on at least two other occasions. She learned to bite and push people after her commitment; the institution responded to this behavior by placing her in a locked, bare seclusion room for days at a time.

Linda Taub spent nine years at Pennhurst with few beneficial activities. Time on the ward was spent sitting and rocking. She was perfectly able to walk but, during one of their visits, Taub's parents found her tied into a wheelchair by a straightjacket. The staff explained that, by strapping her down, they would know exactly where she was.

To most people in the nation, the local instituion for the retarded is only a name, a name associated with the mentally different, with newspaper headlines and with a distant and little known place of confinement. To Terri Lee Halderman, George Sorotos, Nancy Beth Bowman, Linda Taub and thousands of other people, their local institutions are a day-after-day reality, an incarceration which challenges and sometimes defeats their very right to live.

The Institution Called to Account

In May, 1974, for the first time in its almost 70 years of existence, Pennhurst was called to account in a Federal court suit filed in Philadelphia which charged the institution with chronic abuse and neglect of the people forced to live there. The litigation began when, as Director of the Mental Patient Civil Liberties Project, I filed it on behalf of eight Pennhurst residents and the Parents and Family Association of Pennhurst. In 1975, the U.S. Department of Justice intervened and joined

as a plaintiff. Later, the Pennsylvania Association for Retarded Citizens and four more retarded individuals joined the case. The trial lasted from April 18, 1977 until June 13, 1977, making it one of the longest trials of an institution ever presented.

This article is a review of the extraordinary decision in the case in which -- for the first time in American legal history -- a court has held unconstitutional the segregation and confinement of the retarded in isolated institutions. Noting that every resident can and should be living in non-institutional community facilities, Judge Broderick set in motion the first judicially-mandated closing of an institution for the retarded. This article also discusses the implications of the case for the future of institutional care for retarded persons.

The Pennhurst ruling raises profound and basic questions regarding our society's refusal to permit people who are "different" to live among us freely. With more than 200,000 persons living in institutions for the retarded in the United States, and hundreds of thousands more persons in mental hospitals, prisons, juvenile detention facilities and nursing homes, this premier analysis of institutionalization by a court assumes a social and political importance that cannot be ignored.

Rather than reviewing every aspect of the weeks of trial testimony, I have chosen in the comments below to summarize and paraphrase the actual court opinion, letting it speak for itself. Where the court's exact language is used, the words are in quotation marks, without further attribution.

The Nature and History of Mental Retardation in the United States

The court reflected professional opinion in defining mental retardation as an impairment in learning capacity and adaptive behavior which is primarily an educational problem, not a disease which can be cured through drugs or treatment. Countering popular notions, the court found that, with proper "habilitation" (the term of art for training and education), the level of functioning for every retarded person may be improved and that some may even be removed from the ranks of the "retarded."

"History is replete with misunderstanding and mistreatment of the retarded," Judge Broderick wrote. In early America, Puritan ideology resulted in the hanging and burning of retarded individuals on suspicion of witchcraft. Later, in New England, the retarded were lumped together with poor people for purposes of confinement and public support.

"Connecticut's first house of correction in 1722," according to a study quoted in the opinion, "was for rogues, vagabonds, the idle, beggars, fortune tellers, diviners, musicians, runaways, drunkards, prostitutes, pilferers, brawlers -- and the mentally afflicted."*

*This quotation and the information in the next several paragraphs is from Wolf Wolfensberger, The Origin and Nature of Our Institutional Models (1975).

As late as about 1820, the retarded and others (such as the sick poor and mentally ill) were publicly "sold" to the lowest bidder, that is, the person who offered to take responsibility for them for the lowest amount of State financial support. Continuing until 1920, such diverse entities as the U.S. Public Health Service and the National Conference on Charities and Correction grouped the retarded with the deaf, blind, nonspeaking, delinquent and criminal in one general class of "defectives."

Institutions for "deviant" groups were established in the United States in the mid-19th century, originally as small centers, to concentrate intensive training on deviants. With an emphasis on education, and often located in the community, the facilities were geared toward return of persons to their families or living groups.

By the late 19th century, such school-like services were replaced by isolated institutions to provide protection and care. The institutions grew to be viewed as permanent residential centers for the deviant. "With this concept came increased isolation and increased size permitting little time for habilitation. Pennhurst was the product of this era."

Education and Training at Pennhurst

Pennhurst, owned and operated by the Commonwealth of Pennsylvania, has been overcrowded and understaffed since its founding in 1908. The present population is about 1200 and its total staff numbers about 1500. Despite what the court characterized as "tremendous improvement" since the 1950's, the State defendants admitted at trial that "Pennhurst does not presently meet minimum standards for the habilitation of its residents."

Who lives at Pennhurst? A population remarkably similar to that of the nation's other public institutions for the retarded. About half have been committed by a court, with the balance admitted on application of parents or guardians. Eighty percent entered Pennhurst as children. The average age is 36, with an average stay in the institution of 21 years.* Forty-three percent of the residents have had no family contact within the last three years. The average resident has had only one psychological evaluation every three years and one vocational adjustment report every 10 years. A statistical study introduced at trial found that on an accepted test of social quotient (the Vineland) used at Pennhurst, residents decline rather than increase in social skills while at the institution.

Life at Pennhurst is "almost totally impersonal," the court found. Residents have no privacy, sleep in large, overcrowded wards, spend their waking hours together in large day rooms and eat in a similar congregate setting. The institution's schedule allows for no individual flexibility. "Thus, for example, all residents on Unit 7 go to bed between 8:00 and 8:30 p.m.,

*In the country's 250 public institutions for the retarded, 79% of the residents entered as children; the average length of stay is 16.3 years.

are awakened and taken to the toilet at 12:00 - 12:30 a.m. and return to sleep until 5:30 a.m. when they are awakened for the day, which begins with being toileted and then having to wait for a 7:00 a.m. breakfast."

Staffing is a critical problem. Professionals leave and are often not replaced. Their responsibilities are turned over to already-overworked direct-care staff. This, as well as the general institutional orientation, results in a failure to make more than a token effort to meet the residents' needs. Both the plaintiffs and the defendants, the court noted, were in agreement that "Pennhurst as an institution is inappropriate and inadequate for the habilitation of the retarded." Nobody at Pennhurst receives more than 3½ to 4 hours per day of habilitative services, except those at school. The average is only 1½ hours but, if non-beneficial activities like watching TV are subtracted, the average drops to a mere 15 minutes per day.

For every program and service provided to one individual at Pennhurst, there are hundreds who require but are denied the identical assistance. 75 to 100 residents need individually-adapted wheelchairs, but only 50 or 60 have them. More than 300 residents have hearing impairments; only 51 have hearing aids. In order to prevent physical deterioration, 300 to 400 people at Pennhurst need physical therapy but only 143 are receiving it.

Control: Drugs, Seclusion and Restraints

"At Pennhurst, restraints are used as control measures in lieu of adequate staffing." These restraints, which can be physical or chemical, include locking people in seclusion rooms, binding hands or ankles with muffs and straps, lashing people to beds or chairs, and administration of tranquilizing drugs.

Seclusion rooms are hard surfaced and small, many with exposed radiators and other potentials for danger; they have been used at Pennhurst to punish aggressive behavior. One 18-year old spent six consecutive days in seclusion for assaulting another resident.

Physical restraints, the court concluded, "are potentially physically harmful and can create conditions in which physical injuries are more likely to occur, and prevent residents from learning or exercising self-care skills." In 1972, the most serious possible restraint injury took place when an 11-year-old boy, tied into a wicker chair, strangled to death on a Pennhurst ward.

A self-abusive female resident who had blinded herself spent 651 hours (about 27 days) tied down in restraints in June, 1976. In August of that year she was restrained for 720 hours, the equivalent of 30 of the month's

31 days. September and October saw the same woman in restraints for 647 hours of each month. In 1977, for the first time, the resident was enrolled in an occupational therapy program and she is now out of restraints a good part of the day. "Had this programming been initiated earlier," Judge Broderick found, "her self-inflicted injuries might have been avaoided or at least lessened."

Powerful tranquilizing drugs are often used at Pennhurst not for treatment but for control. The rate of drug use on some units is extraordinarily high. A pharmacology expert testified that 51% of a sample group were receiving such medication, with 40% getting two or more psychotropic drugs at one time. These drug practices, combined with Pennhurst's inadequate monitoring of effects, result in a failure to meet "minimal professional standards" and pose a serious physical threat to the residents.

Deterioration and Abuse of Residents

The conditions to which residents are subjected at Pennhurst were graphically identified by Judge Broderick:

> The physical environment at Pennhurst is hazardous to the residents, both physically and psychologically. There is often excrement or urine on ward floors, and the living areas do not meet minimal professional standards for cleanliness. Outbreaks of pinworms and infectious diseases are common.***The environment at Pennhurst is not only not conducive to learning new skills, but it is so poor that it contributes to losing skills already learned. For example, Pennhurst has a toilet training program, but one who has successfully completed the program may not be able to practice the newly learned skill, and is therefore likely to lose it.

Injuries through self-abuse (behavior that is learned on the wards from other residents and which is an expected response to a lack of meaningful activity) is common. Injuries at the hands of other residents is frequent. In one typical month, there were 833 minor and 25 major injuries reported by institutional staff. These characterizations as "major" and "minor" can be deceptive. One Pennhurst parent told the court that lacerations three to five inches long were called "minor."

Trial testimony verified staff abuse. One resident was raped by an employee who, when caught in the act by a security guard, turned and pleaded, "Please give me a break." Another Pennhurst resident was badly bruised when a staff person struck him with a set of keys. Yet another was thrown several feet across a room.

Physical deterioration goes hand in hand with behavioral and intellectual deterioration at institutions such as Pennhurst. The original plaintiff, Terri Lee Halderman, had spent 11 years at the institution by the time Judge Broderick made these findings regarding her condition:

> She has lost several teeth and suffered a fractured jaw, fractured fingers, a fractured toe and numerous lacerations, cuts, scratches and bites. Prior to her admission to Pennhurst, Terri Lee could say "dadda," "mamma," "noy-noy" (no), "baba" (Goodby) and "nana" (grandmother). She no longer speaks.

Even a short stay at Pennhurst can be dangerous. One plaintiff, Robert Hight, who joined the case with the Pennsylvania Association for Retarded Citizens, entered Pennhurst in September, 1974. Within only 2½ weeks, the court observed, he was badly bruised, his mouth was cut, he was heavily drugged and did not recognize his mother. More than half the 45 residents on his ward walked about naked, others only partially clothed. Hight's parents promptly removed him from the institution, Ms. Hight declaring that she "wouldn't leave a dog in a condition like that."

Normalization & Community Services

Times have changed for the retarded. Judge Broderick perceived that "since the early 1960's there has been a distinct humanistic renaissance, replete with the acceptance of the theory of normalization for the habilitation of the retarded."

The term "normalization" referes to treatment of a retarded individual as much like a non-retarded person as possible. A basic tenet of normalization is that a person responds according to the way he or she is treated.* In large institutions, research has demonstrated, residents suffer from apathy, stunted growth, and loss of I.Q. The smaller the living unit, the higher the level of functioning. A dramatic demonstration of this almost common-sense approach was given by Ms. Grace Auerback of Philadelphia, who described the changes in her son since his transfer from Pennhurst to a local apartment in 1973. While at Pennhurst, Sidney Auerback was quiet and never talked. Now, conversation is as with anyone else. He can cook, work, and take care of his own bank account. Ms. Auerback's son, she said, learned more in the 3½ years in the community than in 38 years at Pennhurst.

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*Stated in this way, the much-heralded "normalization theory" is simply a restatement of the Golden Rule. Why is there such a pressing need for society to learn that the retarded must be treated as people? I would suggest that more than a century of legal and social outcasing of this powerless minority has thoroughly isolated most of us from the human-ness of these individuals. Compare, Higginbotham, In the Matter of Color, Race & The American Legal Process: The Colonial Period (1978).

Pennhurst is simply not required for the people now living there. Many could be moved immediately into the community and would be able to cope with little or no supervision. Judge Broderick noted that all parties in the lawsuit -- including the state officials -- "are in agreement that given appropriate community facilities, all the residents at Pennhurst, even the most profoundly retarded with multiple handicaps, should be living in the community."

The primary reason Pennhurst residents are not already out of the institution, the court determined, is "the failure of the Commonwealth and its subdivisions to provide sufficient living units, vocational and day care facilities and other support services at the community level."

When conditions in a Pennhurst unit housing several dozen young people became especially unbearable, some staff members told the administration that, unless a promised change was immediately made, the entire group would leave the institution and register at a Marriot Motor Inn. The change was made the next day. Ironically, full-time stay at a hotel would be far less expensive than institutional care.

In 1976, Pennhurst cost the taxpayers of Pennsylvania about $28 million, or more than $60 per resident per day. State-wide, the cost of community care is about $18 per day, with about one-third of the participants requiring program services at an additional cost of about $10 per day. Non-institutional life for the retarded permits gainful employment; the court found that "85% of the mentally retarded can be employed, though not all are capable of competitive employment. The lifetime earnings of a mildly retarded individual often exceed $500,000."

Freeing the retarded to become productive members of society eliminates the investment at the Pennhurst institution which "is primarily for warehousing," Judge Broderick explained, "and not for the individual's well-being or future planning."

Local Government Participation

Among the defendants in the case were officials of Philadelphia and the neighboring four counties served by Pennhurst. These local officials were accused of fostering needless institutional care. They were found liable by the court for violations of the rights of the retarded.

"The counties presently have a financial incentive to send their retarded to Pennhurst rather than provide them with habilitation within the county," the court concluded. A state law puts 100% of the cost of care in an institution on the state while, for community care, the counties must pay 10% of the cost.

The county units responsible for coordinating care for the retarded, the Base Service Units (BSU's), are typically uninvolved with the families of Pennhurst residents and the residents themselves. The BSU's often fail to investigate less restrictive alternatives to the institution, and placement at Pennhurst is frequently the only option presented to state judges during commitment proceedings.

Reaching the Legal Issues

Having catalogued the horrors, abuses, and warehousing at Pennhurst, Judge Broderick turned to the legal question of "whether the Commonwealth's system of incarcerating the retarded in an institution known as Pennhurst in any way violates their constitutional or statutory rights."

This phrasing of the question points to the reasons the Pennhurst case may be seen as the first in the retardation area to examine the bedrock assumptions of institutionalization. The retarded are seen as being "incarcerated," not "treated" or "cared for." Most significantly, the issue is "the system of incarcerating . . . in an institution." The issue is not whether the conditions are illegal; it is not what programs would make the institution effective. It is whether that system should exist at all.

Therefore, it is not surprising that, in response to the state and county defendants' arguments that they planned to reduce the population to 850 within a short period of time and to improve life at Pennhurst, the court decided that "plans to upgrade and eventually close Pennhurst have little if any, bearing" on whether the "system" is violating people's rights.

The Constitution With a Twist

Judge Broderick took a familiar constitutional legal principle, the right to adequate treatment or habilitation,* and then used the Pennhurst findings to reach a novel result that questions the institution's very existence. In words that are already being echoed by many others, Judge Broderick declared that

> On the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst. As the Court has heretofore found, Pennhurst does not provide an atmosphere conducive to normalization which is so

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*See, e.g., Wyatt v. Stickney, 344 F.Supp. 387 (M.D. Ala. 1972), on appeal, 503 F.2d 1305 (5th Cir. 1975); Welsch v. Likins, 373 F.Supp. 487 (D. Minn. 1974), on appeal, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F.Supp. 715 (E.D.N.Y. 1975).

> vital to the retarded if they are to be given the opportunity to acquire, maintain and improve their life skills. Pennhurst provides confinement and isolation, the antithesis of habilitation.

The constitutional right to care includes a right to care in the least restrictive setting consistent with the individual's needs.* With Pennhurst found to be the most restrictive setting for all who live there, the court held that "there is no question that Pennhurst, as an institution for the retarded, should be regarded as a monumental example of unconstitutionality with respect to the habilitation of the retarded."

In findings similar to other cases, Pennhurst was declared to violate residents' rights to be free from harm, because the physical abuse, beatings, rape, and lack of supervision produce an "atmosphere of danger." Lack of care also violates a state law right to habilitation, the court found.

A New Right: Non-Discriminatory Habilitation

The major and path-breaking contribution of the Pennhurst decision to mental retardation law is the creation of a previously unrecognized right which parallels the facts of institutional life described in the opinion. The right is termed by Judge Broderick as the "right to non-discriminatory habilitation." It is this right which will require that Pennhurst, found to be typical of institutions across the country, must be closed forever.

In reaching this result, Judge Broderick reviewed the thoughts of Professor Robert Burt who said that

> existing large-scale geographically remote institutions cannot by their nature provide adequate programs to remedy the intellectual and emotional shortcomings and the galling social stigma that led the retarded to these institutions. If this evidence is fully marshalled in litigation, courts can . . . rule that present patterns of state segregation of retarded persons for "habilitation" or "educational" purposes are impermissable. Courts can . . . force states to close the Partlows and Willowbrooks and, even more important, to require alternative programs for mentally retarded persons which treat them as indistinguishably as possible from other persons . . . .

Burt, Beyond the Right to Habilitation, in The Mentally Retarded Citizen and the Law 425-432 (1976), as quoted in the Pennhurst decision.

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*For the foundation of this "least restrictive alternative" doctrine, see Shelton v. Tucker, 364 U.S. 479 (1960). It is applied to the retarded in Welsch v. Likins, 373 F.Supp. 487, 502 (D. Minn. 1974), on appeal, 550 F.2d 1122 (8th Cir. 1977).

Responding to the above quotation, Judge Broderick found that "the evidence has been 'fully marshalled' and we find that the confinement and isolation of the retarded in the institution called Pennhurst is segregation . . . . /and that/ equal protection principles . . . prohibit the segregation of the retarded in an isolated instituion such as Pennhurst where habilitation does not measure up to minimally adequate standards."

Just as the State cannot place people in public schools on the basis of their skin color, the State cannot confine people in institutions for education and training based on their label of "retardation."

Judge Broderick's anti-segregation conclusion, coupled with the decision that the institution, by its nature, makes minimally adequate habilitation impossible, spells the end of more than a century of incarceration for the retarded in the United States. Copies of the decision are being rushed to lawyers and advocates for the retarded in other states so that other courts and legislative bodies might be persuaded by this historic Pennsylvania ruling.

A Word on Implementation

A court's opinion is a call to conscience. Its order is a call to action. Judge Broderick's December, 1977 opinion was followed by an order of March 17, 1978 intended to begin the process of implementing the law's requirements.

The order requires the state and county governments to provide "suitable community living arrangements" and "community services" to all Pennhurst residents as well as "Monitoring mechanisms" to assure that "quantity and quality" are maintained. Admissions and court commitments to Pennhurst are ordered closed, so that nobody else will be subjected to the institution's illegal regimen.

Finding that the court's decree would be "impossible" to realize without the assistance of a Special Master, Judge Broderick announced that he would appoint such a person "with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court." The salary and support of the master and his or her staff will be provided by the State.

While Judge Broderick set no timetable and developed no final structure for this final phase of the litigation, he did establish a list of seven plans that the master must produce for the court and the parties. These plans must:

1. Specify the quantity and type of community living arrangements and community services needed;

2. Specify the resources, procedures and a schedule for individual evaluations and an individual exit plan and community program for each class member;

3. Provide for the hiring and training of community staff to prepare plans for class members and assist in executing the responsibility to develop and monitor community services;

4. Develop an on-going monitoring and advocacy system;

5. Provide the class members themselves with information about the implementation of the case;

6. Provide parents and family of the class members with information about the implementation of the case;

7. Provide opportunities for alternative employment to each employee of Pennhurst, including employment in community programs and otherwise.

In addition, the court responded to the day-to-day inhumanity of the institution by ordering the defendants to "take every precaution to prevent the physical or psychological abuse, neglect or mistreatment of any Pennhurst resident"and the court limited use of restraints, seclusion and drugs. No person may be punished by denial of programs. All buildings must be kept "clean, odorless and insect-free at all times." A plan will be prepared by the Special Master for the "interim operation of Pennhurst pending its prompt replacement by community living arrangements and other community services."

Implications of the Pennhurst Decision: The Future of the Retarded

It will take years to fully implement the Pennhurst decision. While the defendants' appeals are exhausted, and as the elements of the court-ordered relief fall into place, the doctrines and policies supported by the decision will be studied, examined and applied to analogous situations.*

Although deinstitutionalization has generally been thought to be federal and state policy and practice, the reality has been quite different. Reductions in mental institutional populations have been accompanied by increases in confinement in nursing homes and other custodial-type facilities. **Adequate community services necessary to avoid incarceration are generally unavailable.+

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*See, Laski, Right to Services in the Community: Implications of Pennhurst, 3 Health Law Project Library Bulletin 1 (May, 1978). Frank Laski, Esq., is one of the attorneys who litigated the Pennhurst case.

**See, Scull, Decarceration: Community Treatment and the Deviant -- A Radical View (1977).

+Comptroller-General's Report to the U.S. Congress, Returning the Mentally Disabled to the Community: Government Needs to Do More, HRD-76-152 (January 7,1977)

For the retarded, this past decade of debate on community care has resulted in almost no action. One report indicates a national drop in the total number of institutionalized retarded from 1971-72 to 1975-76 of 181,035 to 153,584, for a total 15% change.* Another reporter notes a 13% decrease from 1967 to 1975.** These decreases -- whether viewed as large or small -- misstate the real facts because deaths and death rates are not discussed. When Sheerenberger's 15% figure is analysed, it appears that about 10% is attributable to deaths and only 5% to an excess of community placements over admissions.+

The self-interested bureaucracies and the funding highways ("funding streams" is too gentle a phrase) which maintain institutional systems in the United States will have to change if the promise of the Pennhurst case is to be fulfilled. Some progress is already being made. Federal medical assistance funds are becoming available to eligible retarded persons living in small community facilities; federal loans are now available for construction of such facilities for the retarded. The retarded can now receive supplemental security income.

As the colors of the Pennhurst case are raised, a note of caution and perhaps pessimism is in order. The shift to community care has in the past been typically accompanied by a near total failure to provide -- in the community -- for the emotional and material needs of the formerly institutionalized. It is expensive to run institutions, it is cheaper to have people in the community, but it is cheaper yet to forget about them (or worse, to degrade them further) once they are out. As Professor Andrew Scull puts it,

> But for many other ex-inmates and potential inmates, the alternative to the institution has been to be herded into newly emerging "deviant ghettoes," sewers of human misery and what is conventionally defined as social pathology within which (largely hidden from outside inspection or even notice) society's refuse may be repressively tolerated.

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*Sheerenberger, Public Residential Services for the Mentally Retarded (1976).

**Laski, op. cit.

+This conclusion is reached in a recent report on resident population trends in four states: Iowa, Kansas, Missouri and Nebraska. The findings in those four states were applied to the national figures developed by Sheerenberger. Girardeau, et al., Average Resident Population, Patterns of Employment, and Training Needs of State Instituions for Mentally Retarded Citizens in HEW Region VII: The Past and the Future (1978) (submitted to HEW Developmental Disabilities Office, Region VII). For 1976-1977 Sheerenberger has indicated to the authors of the above report a 1.6% death rate nationally among the institutionalized retarded; this compares to the 1.98% found for the five years studied in Region VII (personal communication).

Scull, Decarceration: Community Treatment and the Deviant -- A Radical View 153 (1977). If left alone, there is a real possibility that the state and county governments responsible for providing for Pennhurst residents outside the institution will side-step their legal obligations and will build the most abysmal sort of failure into the "community system."

The promise of the Pennhurst case is a future of full citizenship and enjoyment for the "retarded," with life, work and leisure in the community shared by the rest of our society. The burden of the Pennhurst case is effective engagement in the personal, political, legislative and judicial struggles that lie ahead.

David Ferleger
May 19, 1978